



Council proposes not to declare Herbert River cane railway

On 1 June 2010 the Council released its draft recommendation on the application by North Queensland Bio-Energy (NQBE) under Part IIIA of the *Trade Practices Act 1974 (TPA)* for declaration of the service provided by the narrow gauge cane railway owned by Sucrogen (Herbert) Pty Ltd (formerly CSR (Herbert) Pty Ltd) in the Herbert River district of North Queensland.

In its application of 22 March 2010, NQBE had sought declaration of the service provided by means of the cane railway to enable it to operate its own trains and rolling stock to transport sugarcane to its proposed new cane processing factory near Ingham.

In order to recommend that a service be declared the Council must be satisfied that all of the declaration criteria set out in s44G(2) of the TPA are met. These criteria require that:

- (a) access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.
- (b) it would be uneconomical for anyone to develop another facility to provide the service.
- (c) the facility is of national significance, having regard to:
 - the size of the facility; or
 - the facility's importance to constitutional trade or commerce; or
 - the facility's importance to the national economy.
- (d) access to the service can be provided without undue risk to human health or safety.
- (e) access to the service is not already the subject of an effective access regime.

- (f) access (or increased access) to the service would not be contrary to the public interest.

After considering the application and submissions made by Sucrogen and the Queensland Cane Growers Organisation, the Council reached a preliminary view that although criterion (a),(b),(d) and (e) as noted above were satisfied, it did not consider that the Herbert River cane railway was of national significance. The Council is also concerned that access to the service may be contrary to the public interest.

The Council accepts that whilst the cane railway is critical to cane growers and processors in the Herbert River district, the facility is not of a size, or of sufficient importance to trade or to the national economy, to be of national significance. Although involving over 500 km of track across the entire network, the greatest extent of the railway's reach is less than 60 km. Similarly although the railway carries virtually all the cane produced in the Herbert River district, this amounts to only 13 percent of Australian sugar production or 0.09 percent of Australian merchandise exports. On this basis the Council does not consider that the national significance criterion is satisfied.

In relation to criterion (f) the Council is concerned that access to the railway would lead to additional costs of operating the railway and additional regulatory costs. Whilst in most cases such costs would be outweighed by the gains from increased competition in dependent markets, in this case it is accepted by all parties that, in the shorter term at least, output of cane in the Herbert River district would not increase materially even if the proportion of revenues available to growers increased. Whilst the distribution of income from cane production may change in favour of growers (at the expense of processors) international sugar prices will not be affected and the overall output will not

The Council's draft recommendation is available on the Council's website at

www.ncc.gov.au



The Council has released its final recommendation in favour of the QCLNG Pipeline 15 year no-coverage determination. The final recommendation is available on the Council's website.

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change. In these circumstances the Council is concerned that access may be contrary to the public interest with the ongoing costs of access regulation exceeding the benefits of increased output. Increased output is unlikely to occur for some time and is also dependent on a shift to growing energy canes and significant extra ethanol and electricity production.

The Council now invites written submissions on the draft recommendation. The closing date for submissions is **5pm on 1 July 2010**. Once these further submissions have been considered the Council will finalise its recommendation and provide it to the Commonwealth Minister.

Applications for declaration of QR's Queensland coal rail network

On 19 May 2010 the Council received four applications from Pacific National Pty Ltd, a wholly-owned subsidiary of Asciano Ltd, under s44F(1) of the TPA for declaration of four services provided by the Blackwater, Goonyella, Moura and Newlands railway facilities in Central Queensland owned by QR Limited (ACN 124 649 967) (collectively, **the Services**). The applicant seeks declaration of the Services for the purpose of hauling coal from mines in those vicinities to ports and coal fired power stations.

The declaration applications have been made in the context of the Queensland Government's announcement in December 2009 that QR Limited's coal and above-rail freight business will be publically listed as a vertically integrated company which will trade as 'QR National'. QR Network (a wholly-owned subsidiary of QR Limited) will hold a long-term lease over the Central Queensland coal rail network, which includes the infrastructure which provides the Services.

The Central Queensland coal rail network is subject to the third party access regime established under Part 5 of the *Queensland Competition Authority Act 1997* and the *Queensland Competition Authority Regulation 2007 (Queensland Rail Access Regime)*. The Queensland Competition Authority (**QCA**) is the regulator responsible for administering the Regime. The Central Queensland coal rail network is also subject to QR Network's approved access undertaking which was due to expire on 31 May 2010 but has since been extended. QR Network has submitted a 2010 proposed access undertaking to the QCA for approval. The QCA expects to release its final determination regarding the proposed access undertaking at the end of July 2010.

On 21 May 2010 the Queensland Government announced its intention to amend the legislation establishing the Queensland Rail Access Regime to strengthen the protections available to access seekers and to give new powers of investigation

to the QCA. The proposed amendments, when implemented, will impact on the regulation of the Services. The Queensland Government has also indicated that it will apply to the Council in the third quarter of 2010 for a recommendation that the Queensland Rail Access Regime be certified as an effective regime under s44M of the TPA.

In relation to the declaration applications, the decision whether or not to declare the Services is made by the designated Minister based upon a recommendation by the Council. The designated Minister in this case is the Premier of Queensland, the Hon Anna Bligh MP, because the Services are provided by a Queensland Government-owned entity (s44D of the TPA).

The Council cannot recommend that the Services be declared unless it is satisfied that all of the declaration criteria in s44G(2) of the TPA are met. Similarly, the designated Minister cannot declare the Services unless she is satisfied that all of the declaration criteria are met. In making her decision, the designated Minister must have regard to the object of Part IIIA and consider whether it would be economical for anyone to develop another facility that could provide *part* of the service. The main object of Part IIIA is to "promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets."

The Council commenced its public consultation process on 21 May 2010 and invited interested parties to make written submissions on the applications. As the Council will be considering the four applications together, the Council will treat all submissions as relating to each and all of the four applications. After initially setting a provisional deadline of 21 June for submissions on the applications, the Council issued a revised timetable to allow parties to make submissions that take into account the proposed changes to



The declaration applications are available on the Council's website at www.ncc.gov.au

The Council has released its draft determination on the Kalgoorlie Kambalda pipeline light regulation application. The draft determination is available on the Council's website.

the Queensland Rail Access Regime and the QCA's determination on QR Network's proposed access undertaking. As such, the closing time and date for submissions on the applications is **5pm on Monday 19 July 2010**.

Once the Council has received and considered the submissions, it will prepare a draft recommendation, provide a further opportunity for public comment on the draft recommendation, and provide its final recommendation to the designated Minister.

Declaration under Part IIIA does not provide an access seeker with an automatic right to use the service. Rather, it provides them with a legally enforceable right to negotiate access to the service. If negotiation fails, an access seeker may have the dispute arbitrated by the Australian Competition and Consumer Commission. More information about the consequences of declaration can be found in the Council's Guide to Declaration, which is available on the Council's website.

Application for certification of WA rail access regime

On 12 May 2010 the Council received an application from the Premier of Western Australia, the Hon Colin Barnett MLA, under s44M of the TPA for the certification of the Western Australian Rail Access Regime established under the *Railways (Access) Act 1998* and the *Railways (Access) Code 2000*.

The WA Rail Access Regime covers the railway network specified in Schedule 1 of the Code. This consists of 5000km of rail track in the south-west of Western Australia including the urban (predominantly passenger) network and the non-urban freight network. This generally comprises all standard and narrow gauge track and associated infrastructure west of Kalgoorlie.

Also covered by the regime is the 280km railway operated by The Pilbara Infrastructure PL (a subsidiary of Fortescue Metals Group) from Cloudbreak mine in the eastern Pilbara to Port Headland. The regime does not cover BHP Billiton and Rio Tinto railways in the Pilbara and the railway line east of Kalgoorlie, which is operated by the Australian Rail Track Corporation.

Effect of certification

The practical consequence of a State or Territory regime being certified as an effective regime is that the services which are subject to a certified State regime cannot be subject to regulation under the National Access Regime.

The decision to certify a State or Territory regime is made by the Commonwealth Minister (the Treasurer, the Hon Wayne Swan MP, or the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP) based upon a recommendation by the Council. If the Council recommends certification, it will also make a recommendation as to the appropriate duration for certification.

In deciding whether to recommend that a regime be certified as effective, the Council must have regard to the principles set out in Clause 6 of the Competition Principles Agreement. The requirements for certification recognise that a range of regulatory approaches are capable of incorporating those principles.

The Council must also have regard to the objects in s44AA of Part IIIA of the TPA which are to:

- promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

The TPA provides that the Council must use its best endeavours to make a recommendation within 6 months, with provision for extension in exceptional circumstances. At this stage the Council anticipates that it will make its recommendation on the application within the six month timeframe.

The Council's process

The Council commenced its public consultation process on 17 May 2010. Interested parties are invited to make written submissions on the application. The closing date for submissions is **5pm on 17 June 2010**.

The Council will then consider the submissions, prepare a draft recommendation, provide a further opportunity for public comment on the draft recommendation and provide its final recommendation to the Commonwealth Minister who will decide whether or not to certify the regime as effective.



A copy of the certification application is available on the Council's website at www.ncc.gov.au



Level 9
128 Exhibition Street
Melbourne
Victoria 3000

GPO Box 250
Melbourne
Victoria 3001

Phone:
(03) 9285 7474
Fax:
(03) 9285 7477

Email:
info@ncc.gov.au

website:
www.ncc.gov.au